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Disturbances between neighbours in Germany 1850-2000

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THE DEVELOPMENT OF LIABILITY BETWEEN NEIGHBOURS

Volume 2

Edited by

JAMES GORDLEY

*Comparative Studies in the Development of
the Law of Torts in Europe*



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Disturbances between neighbours in Germany 1850–2000

ANDREAS THIER

4.1 Introduction

The modern German law of neighbour relations is mainly based on a concept of coordinated property rights:¹ §§ 903, 906 and 1004 BGB² form a complex framework of rules which limit the use of property and create a duty to tolerate certain forms of neighbourly land use and the nuisance caused by that use. § 906 sect. 2 BGB provides compensation claims for this duty.³ These compensation claims come close to strict liability. There are also, however, provisions of neighbourhood law which regulate the relations between neighbouring property owners using tortious obligations and therefore presupposing fault: § 909 BGB prohibits digging on someone's own land, if such an act could be dangerous for the situation of the adjoining land. § 907 BGB provides the right to prohibit facilities on the neighbour's land which could effect unlawful intrusion onto the land of the property owner. Even though §§ 907 and 909 BGB are part of the property rights section of the German Civil Code, they constitute delictual obligations at the same time. A culpable violation of these obligations results in a claim for compensation.⁴ Besides these provisions, the delict law in general, established first and foremost in § 823 BGB, is also applicable to the legal relations between neighbours.⁵ Moreover, the compensation

¹ J. Neuner, 'Das nachbarrechtliche Haftungssystem', *Juristische Schulung* (2005), 385–7.

² The rules about the protection of possession, §§ 858, 862, 869 BGB, will not be discussed here, as they are of limited relevance for the perspectives of this paper; for a survey on these rulings see Neuner, 'Haftungssystem', p. 488.

³ For the provisions in § 912 sect. 2 (superstructure) and § 917 sect. 2 BGB (way of necessity), which establish claims for an annuity see as a survey O. Jauernig, *Kommentar zum BGB*, 11th edn (Munich, Beck, 2004), § 912, n. 9 and § 917, n. 5. These claims can be described as a type of denial damage, cf. Neuner, 'Haftungssystem', above, n. 1, p. 490.

⁴ For a first survey see H. Westermann, *Sachenrecht. Ein Lehrbuch*, 7th edn by Westermann, Gursky & Eickmann (Heidelberg, Müller Verlag, 1998), pp. 517–18.

⁵ For a short survey see R.-J. Haag, *Öffentliches und privates Nachbarrecht* (Munich, VVF, 1996), pp. 28–30.

rules in § 906 BGB are – in principle – subsidiary to delict law.⁶ Beyond those property-based rules, the civil law protection of other goods – particularly health and privacy – is based, in principle, on delict law.

This summary could give the impression that property-based neighbourhood law and fault-based delict law are clearly distinguishable from each other. There is, however, a close connection between both normative spheres: so it is argued that the compensation rules in § 906 BGB are also to be applied to health damages and to mere land users.⁷ At the same time, the provisions of property-based neighbourhood law are often used to shape standards for delictual liability: a person acting within the limits of property-based neighbourhood law cannot be liable by delict law.⁸ On the other hand, the culpable violation of obligations, established in §§ 907, 909 and 1004 BGB, results in liability for damages to the neighbour's land caused by such actions.⁹ But beyond these provisions of delict law, damages are, under certain conditions, also compensated by denial damages.¹⁰ There is an even stronger link between these civil law provisions and administrative law. Administrative rules have had an increasing impact on the legal ruling of neighbour relations, especially as the provisions of administrative law are linked to the rulings both of delict law and of property law by legislators and judges.¹¹ Moreover, administrative rules are often also used as binding standards for fault liability, even though most authors argue for the autonomy of civil law liability standards as a basic principle.¹²

This chapter will describe the developments outlined above in further detail. In the first section, the function of the *actio negatoria* as limitation for the use of property rights and the rise of the concept of denial damage as essential legal remedies for the legal settlement of neighbour conflicts

⁶ BGH 26 October 1978, NJW 1979, 164, 165; BGH 20 November 1992, BGHZ 120, 239, 249. Germany; summarising: J. Fritzsche, *Beck'scher Online-Kommentar zum BGB* (1 August 2006) § 906, n. 82.

⁷ See as a first short survey T. J. Möllers, *Rechtsgüterschutz im Umwelt und Haftungsrecht. Präventive Verkehrspflichten und Beweiserleichterungen in Risikolagen* (Tübingen, Mohr, 1996), p. 49.

⁸ BGH 18 September 1984, BGHZ 92, 143, 148–9. As a survey see G. Wagner, *Münchener Bürgerlichen Gesetzbuch*, 4th edn (Munich, Beck, 2004), § 823, n. 306.

⁹ See for a survey P. Bassenge, in *Bürgerliches Gesetzbuch*, founded by O. Palandt, 66th edn (Munich, Beck, 2007), § 907, n. 3, § 909, n. 12 and § 1004, n. 49.

¹⁰ H. Roth, *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, 12th edn (Berlin, Schweitzer de Gruyter, 2002), vol. 3, § 907, nn. 51, 53.

¹¹ As a survey see K. H. Schwab and H. Prütting, *Sachenrecht*, 32nd edn (Munich, Beck, 2006), nn. 352–4.

¹² For a survey on this debate see Wagner, *Münchener Kommentar*, above, n. 8, § 823, nn. 267–70.

will be discussed (at 4.2). In the second section, the tight connections between those property-based rules and the provisions of delict law will be addressed (at 4.3). The third section will deal with the delictual protection of privacy and health in neighbour relations (at 4.4).

4.2 *Actio negatoria* and denial damage

In conflicts between neighbours about the use of land, the *actio negatoria* was an important legal remedy in the tradition of the *ius commune*.¹³ by the *actio negatoria*, the property owner could protect himself, especially against emissions caused by his neighbours. This action was based on his property right and figured as a 'replevin for the freedom of our real estate resulting from the right of property',¹⁴ as Glück stated. The intruder could be ordered to stop all emissions and even to dispose of factories or other buildings causing the emissions. It was also possible to make a claim for compensation and to prevent future emissions.¹⁵ But not every act was seen as unlawful: in the tradition of the *ius commune*, established especially by Bartolus, the right of property granted its owner the power to dispose of his assets at his own free will.¹⁶ Hence, the crucial question arose of where to draw the line between this entitlement and the entitlement of the neighbour to defend himself against nuisance by the *actio negatoria*. Since the period of ancient Roman law, the property owner of a real estate could use his land only as long as he did not disturb his neighbour. As the Roman jurist Aristo said, '*in suo ... alii hactenus facere licet, quatenus nihil in alienum immittat*'.¹⁷ Since about the time of Bartolus, the limits

¹³ For a survey on the Roman tradition: M. Kaser and R. Knütel, *Römisches Privatrecht*, 18th edn (Munich, Beck, 2005), § 27/n. 23–24; M. Kaser, *Das römische Privatrecht I*, 2nd edn (Munich, Beck, 1971), § 98 III 5; M. Kaser, *Das römische Privatrecht II*, 2nd edn (Munich, Beck, 1975), § 245 IV.

¹⁴ Ch. F. Glück, *Ausführliche Erläuterung der Pandecten nach Hellfeld. Ein Commentar X/1* (Erlangen, Palm, 1808), § 685, p. 241: 'eine aus dem Eigentumsrechte entspringende Vindication der Freyheit unsers Grundstücks'.

¹⁵ See Glück, *Erläuterung*, above, n. 14, § 685, p. 239.

¹⁶ Bartolus de Sassoferrato, *Commentaria in primam digesti novi partem*, Note 4 to D. 41,2,17 (= *lex Si quis vi*), edn Lyon 1550, fol. 91^{vb}: *Dominium est ius de re corporali perfecte disponendi nisi lege prohibeatur*. For Bartolus and his doctrine of property see H. Coing, 'Zur Eigentumslehre des Bartolus', ZRG RA 70 (1953), 348–71. For a short survey on the history of property in early modern times see A. Thier, 'Eigentum – rechtlich', *Enzyklopädie der Neuzeit III* (Stuttgart/Weimar, Metzler, 2006), cols. 98–103.

¹⁷ D. 8.5.8.5 (Ulpian); for a discussion of this statement see especially A. Rodger, *Owners and Neighbours in Roman Law* (Oxford, Clarendon Press, 1972) pp. 164–5, A. Watson, *The Law of Property in the Later Roman Republic* (Oxford, Clarendon Press, 1968), pp. 179–80.

for a forbidden *facere* were set, where the property owner acted *animo iniuriandi*, a category derived from the *actio iniuriarum*.¹⁸ Bartholomaeo Caepolla, whose book on the law of servitudes was one of the best-known jurisprudential works in early modern times,¹⁹ granted in such cases this type of legal action against the emitting property owner.²⁰ In this doctrinal perspective, the protection against nuisance was, to a certain extent, linked to the general prohibition of chicanery.²¹ But, besides these cases, the extended commercial use of land was also judged inadmissible: *facere tabernam vel hostiarium, ubi continue fieret ignis et fumus magnus* was, as Bartolus stated,²² a violation of the property limitations between neighbours.²³

This tradition had a strong influence on the development of neighbourhood law in the early nineteenth century. As will be shown in the first subsection, the German courts originally set strict limits on the industrial use of land especially; before then, the Reichsgericht, the supreme court of the second German Empire, changed the general structure of the *actio negatoria* in favour of industrial interests (see 4.2.1). At the same time, administrative law exerted more and more influence on the settlement of conflicts between neighbours. The state started to intervene in relations between neighbours. This development has continued until now (see 4.2.2). As a consequence, the structure of compensation changed. The traditional form of damage compensation lost ground and was increasingly substituted by a sort of denial damage. A concept of

¹⁸ For a deeper discussion see R. Zimmermann, *Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford, Clarendon Press, 1990), pp. 1059–61.

¹⁹ For the widespread reception of Caepolla in Europe see P. Liver, 'Die vom 15. bis 19. Jahrhundert meistgedruckte juristische Monographie: Bart. Caepollae Veronensis I. C. clarissimi Tractatus de servitutibus, tam urbanorum, quam rusticorum praediorum 1473–1859', ZRG RA 99 (1982), 326–41.

²⁰ Bartholomaeus Caepolla, *Tractatus de servitutibus, tam urbanorum, quam rusticorum praediorum* (1473/1477), edn Cologne 1759, 1.31, qu. 4 and 1.53, qu. 1, pp. 95 and 166.

²¹ For this linkage see H. P. Haferkamp, in: *Historisch-kritischer Kommentar zum BGB, Bd. 1: Allgemeiner Teil*, §§ 1–240 (Tübingen, Mohr Siebeck, 2003), §§ 226–31, n. 7; as an example of the legal provision for this type of ruling see I 8 § 27 Allgemeines Landrecht für die preussischen Staaten, which prohibited the 'misuse' of someone's property in order to offend or to damage other persons.

²² Bartolus de Sassoferrato, *Commentaria*, above, n. 16, N. 2 for D. 8.5.8.5, fol. 210^{va-vb}; for a discussion of this concept see J. Gordley, 'Immissionsschutz, Nuisance and Troubles de Voisinage in Comparative and Historical Perspective', ZEuP 1998, 14.

²³ For this tendency in the jurisprudential doctrine of the *usus modernus pandectarum* see P. C. Klemm, *Eigentum und Eigentumsbeschränkungen in der Doktrin des usus modernus pandectarum* (Basel/Frankfurt a. M., Helbing & Lichtenhahn, 1984), pp. 154–6.

compensation created in the field of public law was transferred to the area of civil law (see 4.2.3).

4.2.1 *Actio negatoria and the (un)usual use of land*

In the period around 1850, German courts were quite hostile towards the use of land for industrial purposes.²⁴ In their view, probably influenced in particular by Ernst Peter Johann Spangenberg, judge at the court in Celle,²⁵ the use of land was unlawful and could therefore be forbidden by the *actio negatoria*, if it figured as a *permanent unusual form of use*.²⁶ In such cases, the property owner had to pay damage compensation and to cease running his factory; sometimes he was sentenced only to reduce emissions.²⁷ In this sense, a factory was the near typical form of an impermissible use of land, because, as the court of Wolfenbüttel stated, the 'running of a factory ... is to be seen as an unusual use [of land]'.²⁸ Even though the courts sometimes emphasised the fact that the plaintiff would have to indicate a serious interest, based on damage or nuisance,²⁹ the owner of industrially used land was continually handicapped in conflicts with his neighbour. So Rudolf Ihering, one of the most influential German jurists of his time, recommended that the business should move to a remote

²⁴ For the following see R. Ogorek, 'Actio negatoria und industrielle Beeinträchtigung des Grundeigentums', *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert IV: Eigentum und industrielle Entwicklung, Wettbewerbsordnung und Wettbewerbsrecht*, ed. Coing and Wilhelm (Frankfurt a. M., Klostermann, 1974), p. 40, at 49–56; A. Thier, 'Zwischen actio negatoria und Aufopferungsanspruch: Nachbarliche Nutzungskonflikte in der Rechtsprechung des 19. und 20. Jahrhunderts', *Das Bürgerliche Gesetzbuch und seine Richter. Zur Reaktion der Rechtsprechung auf die Kodifikation des deutschen Privatrechts (1896–1914)*, ed. Falk and Mohnhaupt (Frankfurt, Klostermann, 2000), p. 407, pp. 415–24, both with further references.

²⁵ [E. P. J.] Spangenberg, 'Einige Bemerkungen über das Nachbarrecht', *Archiv für die civilistische Praxis* a. F. 9 (1826), 265, 270–2. For a discussion in further detail see Thier, 'Zwischen actio negatoria und Aufopferungsanspruch', above, n. 24, p. 417.

²⁶ OAG Lübeck 25 November 1858, Seufferts Archiv 15 (1862), Nr. 2, p. 3 *Lübeck*; see also AG Dresden 17 December 1843, OAG Dresden 11 May 1844, Seufferts Archiv 3 (1851), Nr. 7, S. 8–14 (for a gas plant). *Saxony*.

²⁷ OAG Munich 16 April 1861, Seufferts Archiv 14 (1861), Nr. 208, p. 354. *Bavaria*; summarising OLG Braunschweig 22 October 1890, Seufferts Archiv a. F. 46 (1891) = n. F. 16 (1891), Nr. 249, p. 391. *Braunschweig*.

²⁸ OG Wolfenbüttel 26 May 1876, Seufferts Archiv a. F. 32 = n. F. 2 (1877), Nr. 18, p. 26 f., 27. *Braunschweig*; see also OT Berlin 12 October 1875, Seufferts Archiv 31 a. F. (1876) = n. F. 1 (1876), Nr. 116, p. 148, 150 (*Prussia*) and OLG Jena 2 November 1882, Seufferts Archiv 39 a. F. (1884) = n. F. 9 (1884), Nr. 194, p. 280 *Saxony-Weimar-Eisenach*.

²⁹ OG Wolfenbüttel 28 May 1878, Seufferts Archiv a. F. 34 (1879) = n. F. 4 (1879), Nr. 181, p. 269, pp. 270–1 (*Braunschweig*) with further reference to jurisdictional practice.

location, if it wished to continue the production process of its factory.³⁰ This situation changed when the Reichsgericht set new standards for the *actio negatoria*. Up to this time, the German courts had judged the quality of the use of land and the intensity of the emissions in abstract.³¹ The situation of the surrounding land, e.g. the presence of industrial plants on neighbouring land, had not been taken into account. In 1882, however, the Reichsgericht shifted to a more concrete standard by also including surrounding land. The judges ruled, therefore, that the property owner had to tolerate emissions which were usual for the time and place.³² Emissions were allowed as long as they were in accordance with the *local circumstances*.³³ Maybe this new approach was influenced by Pothier's concept of a 'quasi-contrat, qui forme des obligations réciproques entre les voisins'³⁴ in French law: at least in theory, the idea of an 'obligation' not only of the emitting property owner, but also of his neighbour, laid the ground for an obligation to tolerate industrial emissions.³⁵ Actually, in the case law of the Rhenish law area,³⁶ from about 1860 there emerged a tendency towards a widened obligation to tolerate nuisance, which appeared to have also influenced the case law of the Reichsgericht.³⁷ There are two other

³⁰ R. v. Jhering, 'Zur Lehre von den Beschränkungen des Grundeigenthümers im Interesse der Nachbarn', *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* 6 (1862), 81, newly published in R. von Jhering, *Gesammelte Aufsätze aus den Jahrbüchern für die Dogmatik des heutigen römischen und deutschen Privatrechts*, vol. 2: *Abhandlungen aus Band 5-15 der Jahrbücher* (Jena, Fischer, 1882, repr. Aalen, Scientia, 1969), pp. 22, 64.

³¹ Thier, 'Zwischen actio negatoria und Aufopferungsanspruch', above, n. 24, pp. 423-4 for the situation around 1880.

³² RG (3. Senate) 23 May 1882, Seufferts Archiv a. F. 38 (1883) = n. F. 8 (1883), Nr. 8, p. 13 f., 13.

³³ As summarising judgement see RG (3. Senate) 15.5.1896, Seufferts Archiv a. F. 52 (1897) = n. F. 22 (1897), Nr. 146, p. 269 f., 270.

³⁴ R.-J. Pothier, *Traité du contrat de société*, ch. 9, appendix II, *Oeuvres de R.-J. Pothier, contenant les traités du droit français: augmentée d'une dissertation sur la vie et les ouvrages de ce célèbre jurisconsulte, et d'une table alphabétique, analytique et raisonnée des matières du droit civil français contenues dans les oeuvres de Pothier par le même* III, ed. A. M. J. J. Dupin, 2nd edn (Paris, Charles Béchet, 1835), p. 443, pp. 549-60.

³⁵ Similar judgement with A. Bürge, *Das französische Privatrecht im 19. Jahrhundert. Zwischen Tradition und Pandektenwissenschaft, Liberalismus und Etatismus*, 2nd edn (Frankfurt a. M., Klostermann, 1995), p. 405.

³⁶ W. Schubert, *Französisches Recht in Deutschland zu Beginn des 19. Jahrhunderts. Zivilrecht, Gerichtsverfassungsrecht und Zivilprozeßrecht* (Cologne/Vienna, Böhlau, 1977); R. Schulze (ed.), *Rheinisches Recht und europäische Rechtsgeschichte* (Berlin, Duncker & Humblot, 1998).

³⁷ A. Thier, 'Actio negatoria, Nachbarrecht und Industrialisierung der deutschen Rechtsprechung zum Code civil', *Richterliche Anwendung des Code Civil in seinen europäischen Geltungsbereichen ausserhalb Frankreichs*, Dölemeyer, Mohnhaupt,

reasons which might explain the change of the jurisdictional line: Rudolf Jhering's concepts of liability and also of the *actio negatoria* appeared to have had a strong influence on the Reichsgericht.³⁸ Even though Jhering had argued against industrial emissions, he advocated a balancing of the interests of both the emitting property owner and his neighbour.³⁹ Similar to the doctrine in Rhenish law, this concept made it possible to give the interest of industrial land use more weight than before. As a second point, industrial interests in general grew in importance from about the late 1880s.⁴⁰ Apparently, the 5th senate of the Reichsgericht, especially, was not insensitive to industrial emission interests.⁴¹ This becomes clear if one looks at the interpretation of § 906 sect. 1 BGB (1900), wherein the concept of the Reichsgericht had been adopted.⁴² According to this rule, the property owner had to tolerate emissions from neighbouring land which were 'usual for the local circumstances'. So the limits of permissible emissions depended on the situation of the surrounding land. One of the essential points for the application of this rule was the question of where the boundaries for the reference area were to be drawn. At least two judgments of the Reichsgericht make clear that judges supported the emission interests of big producers. In both cases, the judges compared the situation of the disputed land with the situation in other cities; 'local circumstances' could mean, in this interpretation of § 906 BGB, 'different municipalities of one area'⁴³ – and not the situation in the nearby

Somma (ed.) (Frankfurt a. M., Klostermann, 2006), p. 217, pp. 224–33. A similar opinion in Bürge, *Das französische Privatrecht im 19. Jahrhundert*, above, n. 35, pp. 230–3.

³⁸ See for example the adoption of the concept of fault liability by the Reichsgericht, 29.3.1882, RGZ 6, 217, 220–221; R. v. Jhering, *Das Schuldmoment im römischen Privatrecht* (Giessen, Roth, 1867), reprinted in: R. v. Jhering, *Vermischte Schriften juristischen Inhalts* (Leipzig, Breitkopf & Härtel, 1879, repr. Aalen, Scientia, 1968), pp. 155–240. For Jhering's doctrine on the *actio negatoria* see RG 23.5.1882, Seufferts Archiv a. F. 38 = n. F. 8 (1883), Nr. 8, p. 13, 14.

³⁹ Jhering, 'Lehre', above, n. 30, p. 48.

⁴⁰ For this development in general see H. P. Ullmann, *Politik im Deutschen Kaiserreich 1871–1918* (Munich, Oldenbourg, 1999), pp. 21, 69, 78–9.

⁴¹ The underlying reason for this case law appeared to be the link between the 'advantages granted to someone (i.e. the property owner affected by emissions) (higher prices of sale and lease)' and the 'disadvantages', quoted from RG 15.10.1887, Bolze, *Die Praxis des Reichsgerichts in Zivilsachen III* (Leipzig, Brockhaus, 1887), Nr. 89, p. 2. Same perspective with Roth on the legislative conception, *Kommentar*, above, n. 10, § 906, n. 206.

⁴² For the influence of the jurisdictional concept on the drafting of § 906 BGB see Thier, 'Zwischen actio negatoria und Aufopferungsanspruch', above, n. 24, pp. 429–33; for the question of the influence of Jhering's doctrine see *ibid.*, p. 430 n. 102 on the one hand and Gordley, 'Nuisance', above, n. 22, p. 15 n. 17 on the other.

⁴³ RG 5 April 1911, *Das Recht* 1911, Nr. 2733.

surroundings of the emitting land. Even though this standard was also applied in favour of great agricultural plants,⁴⁴ judges stressed that § 906 BGB would demand an 'equitable (*billige*) attentiveness for the industry and its need to make emissions'.⁴⁵ In principle, the concept of § 906 BGB (1900) is still in force, even though it was slightly modified in 1959: a non-essential (*unwesentliche*) nuisance has to be tolerated, § 906 sect. 1 BGB. A (1) substantial (*wesentliche*) nuisance has to be tolerated if it is (2) customary in a place (*ortsüblich*) and (3) cannot be prevented by means which are economically reasonable (*zumutbar*) for the user of the emitting land.⁴⁶ At the time of its emergence, the new conception favoured most notably, but not solely, the industrial use of land. Significantly for this aspect, in numerous judgments, industrial use of land appeared to be the central issue.⁴⁷ During the course of time, agricultural forms of land use such as piggeries also came to be supported by this standard.⁴⁸ In modern times, the interpretation of § 906 sect. 1 BGB by the courts has not changed, if compared to the case law of the Reichsgericht.⁴⁹ The reference area, for example, can still be widened beyond the boundary of a township.⁵⁰ Nevertheless, this rule appears to have lost a little of its importance. This is because of the increasing importance of administrative law for the settlement of neighbour conflicts, which is now to be addressed.

4.2.2 *Administrative rules and the obligations of neighbours*

Until the middle of the nineteenth century, the regimes of public and civil law were strictly separate. Therefore the administrative permit for an industrial plant, a mill or a workshop had no consequences for relations between neighbours in civil law.⁵¹ This situation changed fundamentally

⁴⁴ RG 27 December 1909, JW 1910, p. 149.

⁴⁵ RG 6 July 1910, Gruchots Beiträge 52 (1911), Nr. 6, p. 105, 107.

⁴⁶ BGBl. 1959 I 781 (22 December 1959); for the history of this provision see H. Hagen, 'Der nachbarrechtliche Aufopferungsanspruch nach § 906 Abs. 2 Satz 2 BGB als Musterlösung und Lösungsmuster – Rechtsfortbildung in mehreren Etappen', FS Hermann Lange, ed. Medicus, Mertens, Nörr, Zöllner (Stuttgart/Berlin/Cologne, Kohlhammer, 1992), pp. 483, 493.

⁴⁷ See e.g. RG 27 December 1909, JW 1910, 149–150 (Nr. 14); 10 March 1937, RGZ 154, 161; BGH 6 July 2001, NJW 2001, 3119, 3120–311.

⁴⁸ See for example BGH 30 October 1998, NJW 1999, 356, 357.

⁴⁹ For a vast survey see Roth, *Kommentar*, above, n. 10, § 906, nn. 205–36.

⁵⁰ BGH 23 March 1990, NJW 1990, 2465, 2467.

⁵¹ Prussian higher tribunal (Preussisches Obertribunal) 7 June 1852, Entscheidungen des Königlichen Obertribunals 23, pp. 252, 262 (*Prussia*). For more details see Thier, 'Zwischen actio negatoria und Aufopferungsanspruch', above, n. 24, pp. 435–8.

in 1869, when the Industrial Code for the North German Federation (*Gewerbeordnung für den Norddeutschen Bund*) was issued.⁵² Paragraph 26 of this law protected the owner of a factory, licensed by an administrative permission, against his neighbour: the property owner of land in the neighbourhood of such a factory could not claim the *actio negatoria* in order to stop it. He could only claim measures preventing nuisance or, if these measures would be too expensive, compensation for his damages. As a consequence, § 26 of the Law transferred decisions about the permission of nuisance from the civil courts to the administration.⁵³ Even though this rule was only applicable for quite a small number of factories, the Reichsgericht transferred this legislative concept step by step to all sorts of factories with an administrative permission. The beginning of this process was marked by the Reichsgericht decision on an action brought by the neighbour of a railway in 1882. The plaintiff had suffered damages by flying sparks from the trains, as they travelled near his land. As the permit for the railway did not regulate the duties of the railway entrepreneur based on civil law, the plaintiff claimed the prohibition of the railway by the *actio negatoria*. The Reichsgericht, however, stated that 'the permission for the railway includes the general order from the state authority that the adjoining property owner has to tolerate this nuisance, without which the business would not be feasible'.⁵⁴ In the following years, the Reichsgericht extended this concept to nearly all public permitted factories and similar facilities.⁵⁵ Since then, not only facilities covered by § 26 GewO, but also facilities 'being important for the public good' (*gemeinwichtige Betriebe*), such as police stations,⁵⁶ post facilities,⁵⁷ motorways,⁵⁸ power lines⁵⁹ or, in the present day, a care centre for drug addicts,⁶⁰ were protected against the *actio negatoria*⁶¹ and also against claims based on delict law.⁶² Meanwhile, this jurisdictional case law *praeter legem* is

⁵² *Bundesgesetzblatt für den Norddeutschen Bund* 1869, 245 (21 June 1869); for the history of the industrial code see K. Pollmann, *Parlamentarismus im Norddeutschen Bund 1867–1870* (Düsseldorf, Droste, 1985), pp. 475–80.

⁵³ Thier, 'Zwischen actio negatoria und Aufopferungsanspruch', above, n. 24, pp. 438–9.

⁵⁴ RG 20 September 1882, RGZ 7, 265, 267.

⁵⁵ For further detail see Thier, 'Zwischen actio negatoria und Aufopferungsanspruch', above, n. 24, pp. 439–43.

⁵⁶ RG 25 March 1908, *Warneyers Jahrbuch der Entscheidungen*, supplementary volume 1 (1908), Nr. 380, pp. 285, 286.

⁵⁷ RG 16 October 1910, RGZ 73, 270, 271.

⁵⁸ RG 9 January 1939, RGZ 159, 129, 137–41; BGH 15 June 1967, NJW 1967, 1857, 1858.

⁵⁹ BGH 25 January 1973, NJW 1973, 508. ⁶⁰ BGH 7 April 2000, NJW 2000, 2901, 2902.

⁶¹ For a survey see Roth, *Kommentar*, above, n. 10, § 906, nn. 29, 42–6, 58.

⁶² Clearly expressed in BGH 7 April 2000, NJW 2000, 2901, 2902.

strongly (and rightly) criticised,⁶³ as it leads to a limitation of property without any legislative legitimation and therefore violates § 14 sect. 1, 2 GG. From a historical perspective, the continuity of this case law highlights once more the intense state intervention in neighbour relations.

The development towards an administration-dominated settlement of neighbour disputes in the field of industrial and agricultural emissions continued in the twentieth century: in 1974, the 'Federal law for the protection against emissions' (BImSchG, *Bundesimmissionsschutzgesetz*) took up the concept of § 26 of the Industrial Code.⁶⁴ § 14 BImSchG excludes an *actio negatoria* against every factory licensed by the rules and procedures established in that law; the neighbour is limited to a claim for precautions against nuisance or compensation for his damages.⁶⁵ This ruling has been adopted in legislative rulings on nuclear power plants,⁶⁶ in the law concerning air traffic (*Luftverkehrsgesetz*),⁶⁷ in some essential parts of the law concerning gene technology (*Gentechnikgesetz*)⁶⁸ and in some provisions of the neighbourhood law relating to traffic corporations issued by the individual German states.⁶⁹ As a consequence, in a wide range of cases, the administration-issued licence legalises the use of land and the production of emissions, granting the neighbour denial damage at the same time. The question of liability is, in these situations, irrelevant.⁷⁰

⁶³ F. Peine, 'Privatrechtsgestaltung durch Anlagengenehmigung', NJW 1990, 2442, 2443 with n. 22 and further reference.

⁶⁴ BGBl I 721 (21 March 1974). For a list of the legislative changes since 1974 see H. D. Jarass, *Bundesimmissionsschutzgesetz, Kommentar unter Berücksichtigung der Bundes-Immissionsschutzverordnungen, der TA Luft sowie der TA Lärm*, 6th edn (Munich, Beck, 2005), Einleitung, n. 2.

⁶⁵ 65 As a survey see Roth, *Kommentar*, above, n. 10, § 906, nn. 20–6; in further detail see Jarass, *Bundesimmissionsschutzgesetz*, above, n. 64, § 14, n. 2–11 with further reference.

⁶⁶ Gesetz über die friedliche Verwendung der Kernenergie und den Schutz gegen ihre Gefahren (Atomgesetz), first issued in BGBl. I S. 814 (23 December 1959), current version BGBl. I S. 1565 (15 July 1985, last change 31 October 2006). For the reference to § 14 BImSchG see § 7 sect. 6 AtomG.

⁶⁷ Luftverkehrsgesetz, originally issued 1 August 1922 (RGBl I 681), current version BGBl I 1999, 550, last change 9 December 2006. For the reference to § 14 BImSchG see § 11 LuftVG.

⁶⁸ Gentechnikgesetz, originally issued 20 June 1990 (BGBl. I 1990, 1080), current version BGBl. I S. 2066, last change 17 March 2006; § 23 GenTG excludes the claim for a suspension of production, but grants the neighbour the right to claim such means against nuisance as are possible by the state of technology; economic reasonableness is not demanded.

⁶⁹ See, for a survey, Säcker, *Müncher Kommentar zum Bürgerlichen Gesetzbuch*, 4th edn (Munich, Beck, 2006), Art. 125 EGBGB, n. 3.

⁷⁰ G. Wagner, *Öffentlich-rechtliche Genehmigung und zivilrechtliche Rechts widrigkeit* (Cologne/Berlin/Bonn/Munich, Heymann, 1989), pp. 7–116 and *pass.*; Peine, 'Privatrechtsgestaltung', above, n. 63, 2445–8.

The strong influence of administrative law on civil neighbourhood law also becomes clear if one looks at another provision of § 906 BGB, issued in 1994: according to § 906 sect. 1, cl. 2, 3 BGB, the essentiality of nuisance is indicated by the data issued in administrative rulings such as the *TA-Luft* or *TA Lärm*.⁷¹ By this clause, a sort of limited legislative accessory character between civil law and administrative law has been established.⁷² In the settled case law of the German Federal Court, the Bundesgerichtshof, this has been widened. In 1998, the court ruled that emissions caused by a facility not licensed by the administration could not be judged as customary in a place (§906 sect. 2, cl. 1 BGB).⁷³ Again, administrative law sets the conditions for the lawfulness of emissions in civil law too.

But also beyond the field of environmental law there are tendencies for a dominance of administrative law-based rulings in neighbour relations: since the late nineteenth century, first on the level of the individual states⁷⁴ and in 1960 at the federal level, the planned use of space came to be an issue of legislative ruling and municipal statutory law.⁷⁵ In the field of neighbour relations, the federal law about building (*Bundesbaugesetz*),⁷⁶ since 1987 the building code (*Baugesetzbuch*),⁷⁷ is – beside the state laws on building regulations – essential for the coordination of neighbour interests in

⁷¹ BGBl I 2457 (21 September 1994). For the history of the drafting of this rule see K. Fritz, 'Das Verhältnis von privatem und öffentlichem Immissionsschutzrecht nach der Ergänzung von § 906 I BGB', NJW 1996, 573. In further detail for the application of these provisions see Roth, *Kommentar*, above, n. 10, § 906, nn. 188–91.

⁷² For the term 'limited accessory character of civil law in relation to administrative law' (*limitierte Verwaltungsrechtsakzessorietät*) see J. Petersen, *Duldungspflicht und Umwelthaftung. Das Verhältnis von §906 BGB zum Umwelthaftungsgesetz* (Munich, Beck, 1996), p. 77.

⁷³ BGH 30 October 1998, BGHZ 140, 1, 6. *Germany*.

⁷⁴ For the history of the early zoning see B. Ladd, *Urban Planning and Civic Order in Germany, 1860–1914* (Cambridge, Mass./London, Harvard University Press, 1990), pp. 187–95. For the roots of this remedy in the late Middle Ages see M. Stercken, 'Gebaute Ordnung. Stadtvorstellungen und Planung im Mittelalter', *Städteplanung – Planungsstädte*, ed. Fritzsche, Gilomen and Stercken (Zürich, Chronos, 2006), p. 15.

⁷⁵ For a short survey see W. Berg, 'Wirtschaftsverwaltung einschliesslich Bauwesen', *Deutsche Verwaltungsgeschichte IV*, ed. Jeserich, Pohl and von Unruh (Stuttgart, Deutsche Verl.-Anst., 1985), p. 421, pp. 431–4; H. J. v. d. Heide, J.-D. Kühne, 'Die sozialstaatliche Entwicklung des Boden-, Bau- und Wohnungswesens zwischen Wiederaufbau und umfassender Planung', *Deutsche Verwaltungsgeschichte V*, ed. Jeserich, Pohl and von Unruh (Stuttgart, Deutsche Verl.-Anst., 1987), pp. 874, 881–5.

⁷⁶ 29 June 1960 (BGBl. I 341). For a short survey on its history see M. Krautzberger, *Baugesetzbuch*, 5th edn (Münich, Beck, 2005), Einleitung, nn. 11–14.

⁷⁷ 8 December 1986 (BGBl. I 2253). See for a survey on the history of this law Krautzberger, *Baugesetzbuch*, above, n. 76, nn. 20–2.

building cases: the constitutionally authorised power of municipalities to plan building developments in the area under their jurisdiction is set in concrete. In building plans, issued by municipal councils, zones of specific types of land use (e.g. *housing construction*) are established; the 'Decree about the use of buildings' (*Baunutzungsverordnung*)⁷⁸ supplements the provisions of building plans or can even substitute some of them. These regulations set out quite precisely the form, and to a certain extent also the dimensions, of the use of building land. Such provisions are also intended to settle conflicts between different land use interests of neighbours and grant neighbours administrative law-based subjective rights.⁷⁹ If the municipality does not issue a building plan, legislative planning provisions, set by the *Baugesetzbuch* directly, are applicable. These rulings grant neighbours individual rights based on administrative law as well.⁸⁰ There are, however, no legislative rulings on the effects of these norms to civil law. Against this background, the relationship between the administrative law of neighbourhood and the civil law of neighbourhood has been strongly debated, particularly in the last third of the twentieth century.⁸¹ This seems to be the effect of another legal development which first emerged in the case law of some administrative courts of the late nineteenth century⁸² and gained full strength from 1960. Since then, neighbours have been granted the right to sue the administration in order to enforce individual administrative rights against the administratively unlawful land use of a neighbour.⁸³ As a consequence, the legal settlement of neighbour conflicts became even deeper embedded in administrative law. Both administration and administrative courts were responsible for the cooperation of conflicting land use interests of neighbours in the situation of buildings and, related to this, emissions. As a consequence, a debate arose: if and to

⁷⁸ 26 June 1962 (BGBl. I 429); last change 22 April 1993.

⁷⁹ For an introduction see W. Krebs, 'Baurecht', *Besonderes Verwaltungsrecht*, E. Schmidt-Aßmann (ed.) (Berlin, de Gruyter, 2003), p. 367, pp. 496–504, nn. 232–45; for a detailed discussion see R.-P. Löhr, *Baugesetzbuch*, 5th edn (Munich, Beck, 2005), §31, nn. 62–74.

⁸⁰ Löhr, *Baugesetzbuch*, above, n. 79, §31, nn. 77–80.

⁸¹ For a survey see Haag, *Öffentliches und privates Nachbarrecht*, above, n. 5, pp. 34–42, 106–17.

⁸² In 1877 the Prussian Higher Administrative Court denied such an action, PrOVG 30 April 1877, PrOVGE 14, 378, 382 (*Prussia*). In 1902, however, the Saxonian Higher Administrative Court granted the neighbour action, SächsOVG 26 March 1902, SächsOVGE 2, 77 (*Saxony*). For the history of this development see P. Preu, *Die historische Genese der öffentlichrechtlichen Bau- und Gewerbenachbarklagen (ca. 1800–1970)* (Berlin, Duncker & Humblot, 1990), pp. 54–72.

⁸³ BVerwG 18 August 1960, BVerwGE 11, 95; 25 February 1977, BVerwGE 52, 122. For further detail see Preu, *Die historische Genese*, above, n. 82, pp. 73–90.

what extent the provisions of administrative law would substitute for the remedies of civil neighbourhood law. Since then it has been argued that this legal framework is exclusive in a sense, that civil law-based remedies such as the *actio negatoria* or the provisions of delict law are excluded.⁸⁴ As a consequence, it is also sometimes argued that the building licence granted by the administration is therefore exclusive.⁸⁵ Other authors favour a slightly modified effect of zoning law rules on civil law. According to them, the provisions of building plans in particular contain mandatory declaratory statements on the essential character of a nuisance or at least on its traditional nature in that locality.⁸⁶ But, at least for the time being, the interference of administrative law in neighbour relations appears to encounter resistance at this point. Even though the dominant opinion in the literature on public law argues in favour of the effects of building plans previously mentioned,⁸⁷ the Bundesgerichtshof and the dominant opinion in civil law literature favour a complementary function of administrative zoning law and civil law.⁸⁸ Hence a building plan is judged only as one indicator among others for the appropriate use in a locality⁸⁹ and an administrative building licence does not exclude civil claims.⁹⁰ Even though the 56th German Assembly of Jurists (*Deutscher Juristentag*) voted plainly for this solution,⁹¹ the debate does not appear to be settled. The increasing importance of environmental protection and the resultant

⁸⁴ K. Kleinlein, *Das System des Nachbarrechts. Eine Darstellung anhand des BBauG, des privaten Nachbarrechts und des BImSchG* (Düsseldorf, Werner, 1987), pp. 123–5, 132–3, 138–1; K. Kleinlein, 'Neues zum Verhältnis von öffentlichem und privatem Nachbarrecht', *NVwZ* 1982, 668.

⁸⁵ J. Schapp, *Das Verhältnis von privatem und öffentlichem Nachbarrecht* (Berlin, Duncker & Humblot, 1978), *passim*.

⁸⁶ K. Gaentzsch, 'Ausbau des Individualschutzes gegen Umweltbelastungen als Aufgabe des bürgerlichen und des öffentlichen Rechts', *NVwZ* 1986, 601, 603–4; see also *BVerwG* 29 April 1988 *NJW* 1988, 2396, 2397.

⁸⁷ See H.-J. Birk, 'Umwelteinwirkungen durch Sportanlagen', *NVwZ* 1985, 689, 697; M. Dolderer, 'Das Verhältnis des öffentlichen zum privaten Nachbarrecht', *DVB* 1998, 19, 23–6 with further reference.

⁸⁸ See for example Haag, *Öffentliches und privates Nachbarrecht*, above, n. 5, pp. 87–94 with further reference; H. Hagen (presiding judge for the 5th senate at the Bundesgerichtshof, which judges on civil neighbour law), 'Privates Immissionsschutzrecht und öffentliches Baurecht', *NVwZ* 1991, 817, 819–23 (who argues towards a harmonisation of public and civil law).

⁸⁹ *BGH* 17 December 1982 *NJW* 1983, 751, 752 (Germany); Roth, *Kommentar*, above, n. 10, § 906, n. 218 with further reference.

⁹⁰ Wagner, *Öffentlich-rechtliche Genehmigung und zivilrechtliche Rechtswidrigkeit*, above, n. 70, pp. 90–116.

⁹¹ '56sten Deutscher Juristentag: Die Beschlüsse', n. 52, *NJW* 1986, 3069, 3072, Nr. 52.

development towards a strengthening of administrative power to enforce it could strengthen the impact of administrative law in the area of neighbour conflicts too. As civil law does not provide effective legal remedies for the prevention or even compensation of environmental damages,⁹² a development towards an administration-based neighbourhood law is not unlikely. As a consequence, it could happen that the concept of fault liability loses more ground against the concept of denial damage.

4.2.3 *The concept of denial damage*

As shown above, since the middle of the nineteenth century, legislators and courts have tended to limit the property right-based legal remedies of property owners against nuisance. As compensation for this limitation of property, the property owner was granted a reimbursement. The core of this concept is part of the European legal tradition and had its legal definition, most especially, in the great codifications of the late eighteenth and early nineteenth centuries, such as the Prussian General Land Law (cf. §§ 73, 74 Introduction), strongly linked with the concept of expropriation compensation.⁹³ Against this background, it becomes clear that a claim for compensation such as the one granted in § 26 GewO was independent from fault liability. The property owner lost his claim to prohibit nuisance and was given a claim for money instead. This ruling was later adopted in § 14 cl. 2 BImSchG. The Reichsgericht transferred the concept of denial damage in § 26 GewO in two steps for all situations in which the neighbour had to tolerate nuisance. First, in 1904, the neighbour of a factory licensed by the administration and thus not regulated by the provisions of the industrial code was granted this denial damage.⁹⁴ In a second step, the neighbour who had to tolerate nuisance because of the local circumstances was granted the same compensation.⁹⁵ In 1959, the legislator adopted this concept in § 906 sect. 2, cl. 2 BGB: since then, the property owner who has to tolerate nuisance as a consequence of a land use customary in a locality and who cannot use his own land customary in a locality or whose yield is

⁹² Wagner, *Münchener Kommentar*, above, n. 8, § 823, nn. 167–8 with further reference; for this lack of regulating power in civil law in general see Roth, *Kommentar*, above, n. 10, § 906, nn. 6–7.

⁹³ For a short survey see A. Thier, 'Enteignung', *Enzyklopädie der Neuzeit III* (Stuttgart, Metzler, 2006) coll. 336–8 with further reference.

⁹⁴ RG 11 May 1904, RGZ 58, 120, 132–6.

⁹⁵ RG 10 March 1937, RGZ 154, 161. For the development of the case law established by this judgment see D. Deneke, *Das nachbarschaftliche Gemeinschaftsverhältnis* (Cologne/Berlin/Bonn/Munich, Heymann, 1987), pp. 10–19.

limited beyond 'a tolerable degree' can claim an 'appropriate' (*angemessene*) compensation in money.⁹⁶ This compensation is to be paid not only for damage to the property, but also for health impairments caused by land-related nuisance;⁹⁷ it is sometimes even argued that privacy is also covered by § 906 BGB, in so far as land-related nuisance interferes with this right.⁹⁸ The same principle is applied to the question of whether movable assets are also protected by § 906 sect. 2 BGB, e.g. the cars of workers which were damaged by the emissions from a factory in the neighbourhood: the Bundesgerichtshof did not grant the workers' compensation claims, as they were only visitors to the protected land and their linkage to the land was not close enough;⁹⁹ otherwise the liability according to § 906 sect. 2 BGB would be almost without limit.¹⁰⁰ At this point, the strong connection between liability in neighbour relations and landed estates, and also its problems,¹⁰¹ becomes especially clear.

In some ways, this is also proved by the judicial extension of § 906 BGB which is strictly related to the use of landed estate. The Bundesgerichtshof has even begun to grant compensation claims in cases where § 906 BGB is not applicable by its wording. If it was impossible for the property owner to defend himself against emissions, because he was inhibited from doing so (1) by legal provisions; or (2) by factual causes, and if (3) this nuisance is essential, he can claim compensation¹⁰² by analogy of § 906 BGB. Typical

⁹⁶ For a detailed discussion see Roth, *Kommentar*, above, n. 10, § 906, nn. 249–67.

⁹⁷ K. Larenz, C.-W. Canaris, *Schuldrecht II/2*, 13th edn (Munich, Beck, 1994), p. 663.

⁹⁸ Roth, *Kommentar*, above, n. 10, § 906, n. 111.

⁹⁹ For this case see BGH 18 September 1984 BGHZ 92, 142, *Germany*, denying claims of the workers; for support of this judgment see Fritzsche, *Beck'scher Online-Kommentar*, above, n. 6, § 906, n. 79 with further reference. For a similar case see OLG Düsseldorf 17 August 2001 NJW-RR 2001, 26.

¹⁰⁰ For this argument see P. Marburger, H. Herrmann, 'Zur Verteilung der Darlegungs und Beweislast bei der Haftung für Umweltschäden – BGHZ 92, 143', *Juristische Schulung* 1986, 354, 356.

¹⁰¹ In this case, judged by the Bundesgerichtshof, the workers were forced to return every day to the same place; hence their situation was similar to the situation of the property owner, but nevertheless they were not granted the same legal protection; for the same view as the dominant opinion in the literature, see e.g. Larenz, Canaris, *Schuldrecht II/2*, above, n. 97, p. 663, Wagner, *Öffentlich-rechtliche Genehmigung und zivilrechtliche Rechtswidrigkeit*, above, n. 70, p. 267 n. 96.

¹⁰² As a survey see Säcker, *Münchener Kommentar*, above, n. 69, § 906, n. 141; for further detail see Roth, *Kommentar*, above, n. 10, § 906, n. 66–75 and as a report from the side of the judges at the Bundesgerichtshof H. Hagen, 'Der nachbarrechtliche Aufopferungsanspruch nach § 906 Abs. 2 Satz 2 BGB als Musterlösung und Lösungsmuster – Rechtsfortbildung in mehreren Etappen', *Festschrift für H. Lange*, ed. Medicus, Mertens, Nörr and Zöllner (Stuttgart/Berlin/Cologne, Kohlhammer, 1992), p. 483.

for the first sort of case are the facilities that are important for the common good and run by private persons, such as the care centre for drug addicts mentioned above.¹⁰³ Here, the neighbour has to tolerate the limited access to his property, even though this means an essential burden for him and lowers the yield of his real estate.¹⁰⁴ Therefore, he is granted compensation. An example of the other sort of case can be found where compensation was granted for damages caused by insecticide that had been (illegally) sprayed on a neighbour's land and was then washed into the plaintiff's ground by the rain.¹⁰⁵ Here, it had been impossible for the claimant to act against his neighbour, because he had had no notice of his neighbour's actions. On the other hand, a claim based on delictual liability, i.e. fault liability, could not be granted, as the neighbour had acted without fault in relation to the intrusion of the insecticide. This constellation of facts marks a characteristic type of case: an unlawful land use or a similar action which would result in delictual claims if the defendant had acted with fault, results in damage on the neighbour's land.¹⁰⁶ Here, a gap in legal protection emerges for the property owner. The Bundesgerichtshof closes this gap by an analogy with § 906 BGB. In this way, the court has created a sort of strict liability for these types of neighbour conflicts. This sort of case law *praeter legem* has been strongly criticised in part,¹⁰⁷ as it blurs the boundaries between fault liability and strict liability. The court tried, however, to draw the following boundary for fault liability in the field of legal consequences: it granted only compensation, but not full damages. This means that the property owner is entitled to claim as a maximum the current market value of his land, while higher losses are not covered by § 906 sect. 2 BGB and therefore neither by this judicially created *nachbarlicher Ausgleichsanspruch*.¹⁰⁸ This approach has been criticised by some authors as well. They argue for an entitlement to damages, as § 906 sect.

¹⁰³ See above, n. 60 (BGH 7 April 2000, NJW 2000, 2901).

¹⁰⁴ Actually the visitors to the care centre not only crossed the property of the claimant, but used to stay there; the judges also reported contaminations to the disputed real estate by 'mainline paraphernalia, blood and excrements' (NJW 2000, 2901, 2902).

¹⁰⁵ BGH 2 March 1984 BGHZ 90, 255, 262.

¹⁰⁶ Neuner, 'Das nachbarrechtliche Haftungssystem', above, n. 1, p. 491.

¹⁰⁷ P. Schlechtriem, 'Nachbarrechtliche Ausgleichsansprüche und Schaden ersatzhaftung', *Festschrift für J. Gernhuber zum 70. Geburtstag*, ed. Lange, Nörr and Westermann (Tübingen, Mohr, 1993), p. 407, pp. 413–19; see also H. Roth, 'Vortrag', *Der bürgerlich-rechtliche Aufopferungsanspruch* (Heidelberg, Müller, 2001), pp. 1, 23–31, 45 and *passim*.

¹⁰⁸ See the summary of the established case law concerning this point in BGH 7 April 2000, NJW 2000, 2902; Roth, *Kommentar*, above, n. 10, § 906, n. 73 with further reference.

2 BGB would cover not only the substance of the property, but also the potential yield gained by the use of the property.¹⁰⁹

4.3 Property law and delict law

Paragraph 823 sect. 1 BGB protects, inter alia, the legal rights of life, body, property and health. In principle, an unlawful, culpable violation of these rights results in a claim for damages. That means that the damage caused by a delictual act has to be removed. If this is not possible, the losses of the claimant have to be compensated by money (§§ 249–53 BGB). Contributory negligence reduces the compensation for damages (§ 254 BGB). Para. 823 sect. 2 BGB extends these provisions for the protection of legal rights. Hereafter, a culpable violation of a so-called protective law (*Schutzgesetz*) also results in compensatory damages. Even though these provisions are also applicable to neighbours, the legal framework, described above, modifies their effects in this area: the question of unlawfulness is assessed against the background of the rule laid down in § 906 BGB.¹¹⁰ Hence, an emission which is lawful by the rulings of § 906 BGB cannot result in compensatory damages by § 823 BGB. In this sense, § 906 BGB is a legal justification for nuisance.¹¹¹ Moreover, the Bundesgerichtshof has judged that even damages to movable assets, caused by emissions within the limits set by § 906 BGB, are justified and that the owner of these assets could claim no compensatory damages according to § 823 BGB.¹¹² Again, the court argued that the limits for nuisance are set only by § 906 BGB. This ruling has effected a strong reduction of property protection, because the owner of movable assets cannot claim compensation under the rule of § 906 sect. 2 BGB.¹¹³ The

¹⁰⁹ Säcker, *Münchener Kommentar*, above, n. 69, § 906, n. 137; Roth, *Kommentar*, above, n. 10, § 906, n. 73; supporting the case law of the BGH by arguing that § 906 only contains the provision for *Entschädigung*, not for *Schadenersatz* (as provided in §§ 249–54 BGB), Fritzsche, *Beck'scher Online-Kommentar*, above, n. 6, § 906, n. 77.

¹¹⁰ Wagner, *Münchener Kommentar*, above, n. 8, § 823, n. 306.

¹¹¹ BGH 13 July 1965 BGHZ 15, 146, 148; BGH 2 March 1984 BGHZ 90, 255, 257–8; BGH 24 January 1992 BGHZ 117, 110, 111 (for the situation of a special delictual rule ordering tortious liability for livestock owners, whose animals cause damage, § 833 BGB. In the case, judged by the Bundesgerichtshof, bees of the defendant had fertilised the flowers on the land of the plaintiff. The plaintiff claimed compensatory damages, because he could not sell the fertilised flowers any more).

¹¹² BGH 18 September 1984, BGHZ 92, 143, 148–9.

¹¹³ See above, at n. 99. For a critical analysis of this judgment see Wagner, *Öffentlich-rechtliche Genehmigung und zivilrechtliche Rechtswidrigkeit*, above n. 70, pp. 267–8.

same concept is applied in cases of emitting factories licensed by the provisions of emission law and protected by § 14 BImSchG.¹¹⁴ Even in the area of environmental strict liability, there is a tendency in literature to justify emissions resulting in compensatory damages by the application of § 906 BGB: the 'Law about the liability for environmental damages' (*Umwelthaftungsgesetz*), issued in 1990, provides strict liability for damages to life and body, health and property, caused by certain types of factories, specified in the law.¹¹⁵ But, as previously mentioned, it is argued that those claims for compensatory damages would be excluded if the emissions in question were covered by § 906 BGB.¹¹⁶

On the other hand, administrative orders on the limits of emissions provide the basis for compensatory claims: if the rules of an administrative licence for factories are violated, the neighbour can claim compensatory damages for losses caused by this violation. The problem here is, however, that the neighbour has to prove the linkage between this illegal act and the damage.¹¹⁷ But German courts have ruled that a shift of the burden of proof takes place if the claimant can prove that emissions have exceeded the maximum permissible values of emissions. In that case, the plaintiff has to prove that the damages have not been caused by the emissions of his factory.¹¹⁸

The concept of denial damage, developed in the emission cases, has also influenced the application of other legal provisions which were originally intended to protect property in neighbour relations: the provisions in §§ 907 and 909 BGB can result in fault liability if the violation of those rules has caused damage.¹¹⁹ But even in this area the courts have granted claims for denial damage if the property owner could not act against such intrusions for factual or legal reasons.¹²⁰ Once more, the impact of the denial damage concept becomes clear.

¹¹⁴ Wagner, *Münchener Kommentar*, above, n. 8, § 823, n. 626.

¹¹⁵ 10.12.1990 (BGBl. I 2634), §1. For a detailed analysis see P. Salje and J. Peter, *Umwelthaftungsgesetz. Kommentar*, 2nd edn (Munich, Beck, 2005).

¹¹⁶ Petersen, *Duldungspflicht und Umwelthaftung*, above, n. 72, pp. 11–40; J. Petersen, 'Beweislast bei Gesundheitsbeeinträchtigungen durch Emissionen und nachbarliche Duldungspflicht', NJW 1998, 2099, 2100.

¹¹⁷ Wagner, *Münchener Kommentar*, above, n. 8, § 823, n. 628.

¹¹⁸ BGH 18 September 1984, BGHZ 92, 143, 147–8.

¹¹⁹ See above at n. 9 and Roth, *Kommentar*, above, n. 10, § 907, n. 53, § 909, n. 45.

¹²⁰ For cases related to §909 BGB see BGH 26 October 1978 BGHZ 72, 289, 292; 26 November 1982 BGHZ 85, 375, 384; 23 February 2001 NJW 2001, 865, 866.

4.4 Protection of health and privacy

Life, body and health are protected, as mentioned above, in principle only by the provisions of delict law. Beside these fault liability-based provisions, a strict liability for industrially caused damages has been established by the *Umwelthaftungsgesetz*.¹²¹ Nevertheless, the rise of denial damage and administrative law has resulted in a new approach to these provisions: it has been argued that the duty to tolerate administration-licensed emissions, issued in § 14 cl. 1 BImSchG, is to be applied to health too.¹²² The same argument is brought forward for the provisions in § 1 UmweltHG, as far as emissions are concerned, which would be (at least in the case of impairments to health, such as headaches) justified by § 906 BGB.¹²³ In these cases, compensation according to § 14 cl. 2 BImSchG, § 906 sect. 2 BGB is to be paid.

The protection of privacy appears to be influenced by administrative law too. The case law in this field is discussed under the name 'ideal emissions'.¹²⁴ It covers situations such as the running of a brothel¹²⁵ or the video surveillance of a neighbour's grounds.¹²⁶ Even though the courts sometimes grant a claim for forbearance by §§ 823 and 1004 BGB,¹²⁷ the solution of such conflicts is more and more seen as a specific task for administrative law.¹²⁸

4.5 Conclusion

Nowadays, legal conflicts between neighbours are often marked by a triangular structure: the state acts – at least in an ideal perspective – as moderator. The strong impact of administrative law mirrors this trend. As a consequence, neighbourhood law is marked by a double-tracked legal structure of administrative law and civil law provisions. This development has become part of a discussion about its further consequences for

¹²¹ See above at n. 115.

¹²² Wagner, *MünchKommBZ*, above, n. 8, § 823, n. 307, 626 with further reference.

¹²³ Petersen, *Duldungspflicht und Umwelthaftung*, above, n. 72, pp. 6–10, 109; Petersen, 'Beweislast', above, n. 116, p. 2100.

¹²⁴ For a survey see Fritzsche, *Beck'scher Online-Kommentar*, above, n. 6, § 903, nn. 26–7.

¹²⁵ BGH 12 July 1985 BGHZ 95, 307.

¹²⁶ LG Bonn 16 November 2004 NJW-RR 2005, 1067. For those cases see H. R. Horst, 'Der Nachbar als "Big Brother" – Grenzen zulässiger Videoüberwachung', NZM 2000, 939.

¹²⁷ Roth, *Kommentar*, above, n. 10, § 906, n. 131–2 with further reference.

¹²⁸ Fritzsche, *Beck'scher Online-Kommentar*, above, n. 6, § 903, n. 28.

the unity of the legal order.¹²⁹ Actually, there is a strong tendency for the dominance of public law in neighbourhood law. One of the main reasons for this development is the fundamental economic change and its consequences for the situation of neighbour relations: the Roman jurist Aristo took a cheese shop as an example of unlawful emissions.¹³⁰ Since the Industrial Revolution, however, emissions have, in many cases, affected not only a single neighbour, but whole regional areas. As a consequence, the law of emissions has grown from a small-scale context¹³¹ to become a matter of public interest.

From a historical viewpoint, this situation could be described as a development from civil property law, based primarily on the rules of the *actio negatoria*, to a complex framework of administrative and civil law provisions ruling neighbour relations. In this legal order there is comparatively little space left for the concept of fault liability. This also becomes clear by looking at the rise of new legal remedies for environmental damages which are based on the concept of strict liability. Resulting especially from the economic change caused by the Industrial Revolution, the regulation of nuisance has increasingly become an issue of public regulation by legislation, statutory law and administration-issued provisions.

¹²⁹ D. Felix, *Einheit der Rechtsordnung. Zur verfassungsrechtlichen Relevanz einer juristischen Argumentationsfigur* (Tübingen, Mohr Siebeck, 1998), pp. 83–109; Ch. Bumke, *Relative Rechtswidrigkeit. Systembildung und Binnendifferenzierungen im öffentlichen Recht* (Tübingen, Mohr Siebeck, 2004), pp. 60–5.

¹³⁰ D. 8.5.8.5. see above, n. 17.

¹³¹ For a similar approach see Roth, *Kommentar*, above, n. 10, § 906, n. 5.